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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. [redacted] 32

GALE H. JOHNSON,
Petitioner,

vs.

JOHN E. BENNETT, WARDEN, IOWA STATE PENITENTIARY, FORT MADISON, IOWA,
Respondent.

BRIEF FOR THE RESPONDENT IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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CITATION TO OPINIONS BELOW

The petitioner's citations are deemed sufficient except that the opinion of the United States Court of Appeals has now been reported in 386 F.2d 677 (1967).

JURISDICTION

The statement of jurisdiction in petitioner's application is deemed sufficient.

CONSTITUTIONAL PROVISION

The citation of Amendment XIV, Sec. 1, Constitution of the United States, as quoted in petitioner's application is deemed sufficient.

QUESTIONS PRESENTED

1. Was there a suppression of evidence violative of due process of law in the petitioner's 1934 trial, where the sheriff erroneously reported on a subpoena return that one of the several requested defense witnesses was not available to testify?

2. Should the petitioner's thirty-four year old conviction be overturned on the ground that due process was denied by the admission of inculpatory notes at trial, allegedly written by the defendant and supported by expert testimony, the certainty of which is now contested by modern experts?

3. Does a state have the constitutional right to require a defendant to assume a limited burden of proof on the issue of "alibi", if he chooses to present that defense?

STATEMENT OF THE FACTS

The petitioner was arrested in Des Moines, Iowa, on May 30, 1934, for the shotgun slaying of Captain F. W. Sauer of the Burlington, Iowa, Police Department three days earlier. (Original trial record, hereafter referred to as "R.", p. 110). Although there was no eyewitness to the crime two persons did observe the petitioner and another man coming from the vicinity of the shooting and get into a dark V-8 Ford car after bending the license plate down (R. p. 83). The petitioner was seen carrying a sawed off shotgun at that time (R. p. 43, p. 82). An-

other witness recalled seeing a similar auto about 28 miles from Burlington, heading toward Des Moines at a high rate of speed on a dirt road approximately an hour to an hour and a half after the murder. Testimony was also presented by the State which placed the petitioner in Illinois, several miles east of Burlington, with a shotgun, the Friday night before the Sunday morning Captain Sauer was killed (R. p. 164). A V-8 Ford coupé found at the Des Moines home of the petitioner was subsequently taken to Burlington and identified by witnesses as like the car they testified seeing being driven out of town after the shooting (R. pp. 83-4).

The petitioner chose not to take the witness stand, but no less than eight of his defense witnesses testified that he was in Des Moines the night before and the morning of the Burlington shooting. One requested witness, a former suspect in the case, Thomas Orsucci, was not obtained because the Polk County (Des Moines) Sheriff's office made a return on November 19, 1934, indicating that the witness was detained in the Clarinda institution for the insane. A later search of the records revealed that Mr. Orsucci, also known as Thomas Sanders, was released from jail on December 8, 1934, two days before the petitioner was sentenced (Pl. Ex. 3; Record, Federal District Court Habeas Corpus Hearing, p. 17, hereafter referred to as "H.R."). Mr. Orsucci executed an affidavit on the behalf of the petitioner on February 11, 1949, to the effect that he had knowledge of certain facts pertinent to the defense, but no attempt was ever made to perpetuate his testimony. Mr. Orsucci died in 1965 (Pl. Ex. 12 and 13, H.R. p. 25).

The State produced other evidence at trial which included an incriminating conversation between the petitioner and another inmate (R. p. 171, p. 203). Certain in-

culpatory notes which the petitioner allegedly wrote were also introduced and expert testimony regarding the handwriting was used in support. The defendant presented strong rebuttal to the notes and the testimony of the other inmates, by the testimony of yet another prisoner, named Yates (R. p. 275).

After one unsuccessful attempt in Federal District Court in 1961, the petitioner again raised his claims in 1966 and was granted an evidentiary hearing before that court (Petitioner's application, Appendix A, pp. 19-32). The writ of habeas corpus was denied and appeal was made to the Court of Appeals. That court also found that the petitioner had failed to establish violation of federal constitutional rights and affirmed the judgment of the lower court (Petitioner's application, Appendix B, pp. 34-46).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The initial allegation presented by the petitioner in support of his application is based on the erroneous return of a subpoena from the Sheriff of Polk County in 1934, that one of the requested witnesses, Thomas Orsucci, was in the Clarinda institution for the insane. It was revealed in the evidentiary hearing before the Federal District Court that Mr. Orsucci was also known by the name of Thomas Sanders and had been in the Polk County Jail from November 15, 1934 to December 8, 1934, under the last mentioned name (H.R. pp. 18-20). The petitioner again met Mr. Orsucci in 1936 or 1937, while both were in the state penitentiary (H.R. pp. 33-4). Approximately twelve years later, an affidavit was obtained, in which Mr. Orsucci claimed to have "knowledge of certain facts pertinent to the defense" (H.R. p. 36). Another fifteen years went by without gaining any record of just what Mr. Orsucci knew about the case and the doubt was made permanent by his death in 1965 (H.R. p. 25).

It is uncontroverted that Mr. Orsucci, if he would have testified, would have testified that one of the state witnesses who saw the petitioner near the scene of the crime, had previously "mistakenly" identified him (Orsucci) in connection with the murder (H.R. pp. 48-9). In other words, Thomas Orsucci would have been used for attempted impeachment of one of the two eyewitnesses for the state.

It should be obvious why the lower courts were unable to apply the suppression rule of *Brady* v. *Maryland*, 373 U.S. 83, as the petitioner would prefer. Assuming arguendo that there was malice by the Sheriff of Polk County with regard to the Burlington (Des Moines County) prosecution, there is a clear lack of materiality of such proposition, to the guilt or punishment of the accused. The unusual age of this case, combined with the death of the witness and the lack of concern by the petitioner while the witness was alive (H.R. p. 56), all serve to highlight the good judgment of the lower court's rulings. We seriously doubt that the administration of criminal justice would be aided by any rule which would resurrect the unrecorded testimony of the dead and embellish it with importance it apparently did not have when the witness was alive and available.

2. The petitioner's second ground for granting the requested writ of certiorari is that the courts below failed to vitiate his conviction for the reason that inculpatory notes allegedly written by him were used in evidence and are now subject to question according to more modern handwriting analysis. These notes were received by a record clerk at the penitentiary and turned over to the Des Moines County (Burlington) Attorney (R. p. 167; H.R. p. 68). Following examination of the notes by a

Chicago, Illinois handwriting expert who gave the opinion that the petitioner had written them, notice of their expected use at trial was personally served on the petitioner on November 8, 1934 (H.R. p. 72). Because the trial did not begin until November 13, 1934, the accused was not given notice on the "eve" of the trial as it is stated in his argument (Application, p. 11), and the notice was in full accord with the Iowa law (Section 780.10, 1966 Code of Iowa, formerly Section 13851, Code of Iowa 1931). The petitioner's attorneys did not raise the issue on appeal and the petitioner did not and does not claim they were incompetent (H.R. pp. 73-4). The defense presented a forceful rebuttal to the authenticity of the notes and the court cautioned the jury regarding what was called "the lowest order of evidence" (R. pp. 275-294; R. p. 376).

The court below was well aware of the long standing rule against the knowing use of false evidence by the prosecution as shown by the reference to *Miller* v. *Pate*, 386 U.S. 1, in its opinion (Application, Appendix B, p. 37; 386 F.2d 677, 679-680). The "significant role played by false evidence" was not, as the petitioner correctly indicates, questioned by the Court of Appeals. The reason for this omission is refreshingly clear on at least three points. First, whether or not the notes were "false evidence" is still at the mercy of expert opinion. Second, there is no showing by the petitioner that the expert opinion was not honest or that the prosecution was not justified in using it in 1934. Third, and of utmost importance, is the reason that the notes did not take a "significant role" in the trial of that case. While the petitioner focuses upon five state witnesses and the notes, his argument is somewhat less persuasive when the original trial transcript is considered. The State presented a total of twenty-eight witnesses, the

defense, fifteen. While a mere head count of witnesses proves nothing, reference to the testimony of the State's other twenty-three witnesses provides substantial support for the conviction without the notes and accompanying testimony.

Because it is unknown whether the 1934 jury gave any weight to the notes, and whether future handwriting experts may disagree with the present experts, the courts below were clearly correct in refusing to create a new rule or apply a well established one to the hopelessly unstable circumstances on which the petitioner has rested his case.

3. That last reason submitted by the petitioner in support of his application is based on a single instruction presented to the jury in his 1934 trial (Appendix C of Petitioner's application R. pp. 374-5). The essence of the contested instruction, the law of Iowa and several other states, is that when an accused chooses the defense of "alibi," he also accepts the burden of proof to sustain it by a preponderance of the evidence. That is, if he chooses to prove he was at a place other than where the State's evidence shows he was, then he must also accept a limited burden of proof.

The wisdom of the "alibi" instruction has long been considered by the Iowa Supreme Court. Both the majority view and the dissent have recorded succinct statements of their positions in *State* v. *Stump*, 254 Iowa 1181, 119 N.W.2d 210, so that further repetition here appears unnecessary. While some have been critical of the alibi instruction rule, it should be noted that such discussions do not assist in the discovery of a due process violation on any particular set of facts. Logic demands the conclusion that even if the wisdom of the rule is questionable, it need not assume the magnitude of constitutional error. Thus, in

spite of the petitioner's well reasoned argument on the theory of alibi, the question remains whether or not his right to due process was violated in 1934.

Admittedly, a majority of the states and perhaps all Federal jurisdictions do not agree with the alibi instruction. The court below recognized this authority, but wisely observed that this case did not show deprivation of Constitutional right. The first good reason for this conclusion appears on the very face of the alibi instruction where the court ordered the jury to acquit the defendant, if upon the whole case, including the alibi, there was a reasonable doubt of guilt. Of course, it is generally observed that instructions should not be viewed piecemeal when attempting to determine fairness to a defendant. Thus, when certain other instructions in the trial below are studied, it becomes clear that any argument that petitioner was denied his right to presumption of innocence or reasonable doubt must fail when confronted by the very words of those other instructions (R. pp. 364-5). It should also be obvious that the petitioner was neither forced to take the witness stand nor was he obligated in any way to raise the defense of alibi and thereby assume a limited burden of proof.

While the Supreme Court has not directly faced the alibi instruction issue, it does appear that a similar matter has been considered. Due process was found not to have been violated, where the defendant was required to prove his defense of insanity. *Leland* v. *Oregon*, 343 U.S. 790. It is especially noteworthy that the standard used in the approved insanity defense was "beyond a reasonable doubt," whereas the alibi instruction requires the lower degree of "by a preponderance of the evidence."

Although the petitioner has discounted the issue of retroactivity because of this Court's decision in *Stovall* v.

Denno, 388 U.S. 293, his argument on the question is somewhat unclear. He offers *Glover* v. *United States,* 147 Fed. 426, as support for his contention that the alibi instruction is unconstitutional. If that proposition is correct, then the requested due process right against the alibi instruction has existed since at least 1906 A.D. However, we doubt if this is so and agree with the Court of Appeals below, where the opinion states:

> "No challenge was made to the alibi instruction on constitutional grounds in the defendant's trial resulting in his conviction or in his appeal therefrom. We have little doubt that such challenge, if then made, would have been rejected. We do not believe that the challenge now made, even in the event it is entitled to be upheld under present day standards, would be given retroactive application to the 1934 conviction." (Application, Appendix A, p. 45; 386 F.2d at page 683).

While the petitioner relies on a case over half a century old, he also appears to ask that the Supreme Court establish the *Glover* rule as a matter of constitutional law now, apply it back thirty-four years and then wait for another case to determine an effective date of application. Because the petitioner's trial occurred so many years ago, the problems involved with declaring him a chance beneficiary of a newly found rule appear to be especially acute. It is for this reason that retroactivity is not an issue lightly cast aside.

We submit that the factors discussed above make this an unusually inappropriate case on which a question of constitutional dimension may be founded. It is not a question of hard cases making bad law, it is a matter of whether the petitioner can reasonably be said to have had a failure of constitutional protection on the facts of his case.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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